United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2693

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-2693

UNITED STATES OF AMERICA

PLAINTIFF - APPELLEE

VS.

GUY DiGIROLAMO

DEFENDANT - APPELLANT

BRIEF OF DEFENDANT - APPELLANT

GUY DiGIROLAMO

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STATEMENT OF THE CASE

This is an appeal from a judgment imposed upon defendant Guy DiGirolamo on a seven count indictment returned by a grand jury of the District of Connecticut against defendant Guy DiGirolamo and co - defendant Carl Alterio, on July 24, 1973.

Counts One, Three and Five charged co - defendant Alterio with having used extortionate means to collect an extension of credit in violation of 18 U.S.C. Sec. 894 on May 18, 1973, May 25, 1973 and June 1, 1973 respectively.

Counts Two, Four and Six charged that defendant Di-Girolamo aided, abetted, counseled, commanded, induced, procured and caused Alterio to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. Sec. 2 on May 18, 1973, May 25, 1973 and June 1, 1973, respectively.

Count Seven charged that defendant DiGirolamo and Alterio conspired to use extortionate means to collect an extension of credit likewise in violation of Sec. 894 between May 11, 1973 and June 1, 1973.

Trial commenced on August 13, 1974 before the Hon. Robert C. Zampano, U. S. District Court Judge, at New Haven, Connecticut. After a jury was impanelled and sworn Alterio withdrew his not guilty plea and pleaded guilty to Counts Three and Five of the indictment, and was thereafter neither present nor otherwise involved with defendant DiGirolamo's trial proceedings.

At the close of the government's case, the court denied defendant DiGirolamo's Motion For Judgment of Acquittal.

On August 21, 1974, the jury found defendant DiGirolamo not guilty on Count Two and guilty on Counts Six and Seven. After the jury announced that they could not agree on Count Four, the court accepted their verdicts, excused the jury and thereupon dismissed Count Four.

A judgment of conviction was entered by Hon. Robert C. Zampano on December 13, 1974 adjudging defendant guilty as charged under Counts Six and Seven and sentencing him, under Count Six, to imprisonment for 30 months and under Count Seven, imposition of sentence suspended with probation for three years from the date of release from prison.

After conviction a timely motion for Judgment of Acquittal or in the Alternative For a New Trial was filed and was thereafter denied by the court.

Timely notice of appeal from his conviction was filed by defendant.

STATUTES INVOLVED

18 U.S.C. §2 Principals

a) Whoever commits an offense against the United States or aids, abets,counsels,commands, induces or procures its commission, is punishable as a principal.

18 U.S.C §891 Definitions and rules of Construction

* * *

7) An extortionate means is any means which involves the use or an express or implicit threat of use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

* * *

18 U.S.C. §894 Collection of extensions of credit by extortionate means

a) Whoever knowlingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonpayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years,or both.

* * *

ISSUES PRESENTED

1. Was the testimony of Harvey Adam incredible and incompetent as a matter of law?

2. Did the government produce sufficient evidence against the defendant to warrant submission of the case to the jury?

FACTS

Defendant's conviction was based on the testimony of one Harvey Adam. His testimony was to the effect that he had been wagering on various sporting events with defendant's brother Angelo DiGirolamo and that by October, 1972 he had won approximately $11,000, which sum was never paid. (15a) Thereafter, Adam began wagering with Defendant and within a brief period of time lost $10,000. When contacted by defendant for payment of the debt, Adam expressed his intention to set off the $10,000 against the $11,000 owed him by defendant's brother. (16a)

After occasional unsuccessful requests by defendant for payment during the ensuing months, Alterio went to Adam's place of business, known as the Sugar Cone Ice Cream Parlor, at various times in May 1973 demanding that Adam pay a portion of the debt owed to defendant. Adams refused, and during a tape-recorded conversation, Alterio threatened him. (4a-14a)

Although defendant was not charged in the indictment with having personally threatened Adam to collect the debt, the Government sought to prove that he aided, abetted and conspired with Alterio to do so. A comprehensive analysis of the lack of credible, competent evidence in support thereof is hereinafter set forth.

ARGUMENT

I. ADAM'S TESTIMONY WAS INCREDIBLE AND INCOMPETENT AS A MATTER OF LAW.

Since the Government's case must either stand or fall with Adam's testimony, the multitude of inconsistencies, lapses of memory, contradictions and false testimony under oath must be carefully scrutinized.

Adam's testimony during cross-examination shows that he was virtually unable to coherently approximate the dates of the alleged conversations with either defendant or Alterio. He could not recall his testimony before a grand jury in 1972 (Tr. 124). Neither could he recall the month he testified before the grand jury which returned defendant's indictment in 1973 nor what he had told the grand jury. (Tr. 123-127). He could not recall other persons with whom he was betting between November, 1972 and June 1973, although he admitted to having bet with others (Tr. 112,123, 124), nor could he recall whether he first met defendant in 1971 or 1972 (Tr. 135-137). Furthermore, by his own admission, his testimony as to dates should not be given too much credence. (41a).

Contradicting his direct testimony, he stated on cross-examination that he did not lose $10,000 to defendant in January 1973 as a result of betting on the Super Bowl. (15a, 16a Tr. 139-141, 246).

His failure to recollect crucial dates and events of which the foregoing is just a minimal sampling is either

attributed to his "other problems" (Tr. 125, 126, 137) or to his desire to go forward and not backwards. (Tr. 127).

Even the alleged threats by Alterio and/or defendant were merely his own paraphrased versions of the conversations, and not the exact statements of the parties, so crucial in a case such as this, nor were they intended as such. (47a, 49a-51a).

Additionally, by his own admission he testified falsely before the grand jury that he had never bet with a man named Perry. (37a-39a). However, the high-water mark of his testimony perhaps, was his inability to recall the name of the man (Frank Mancini) with whom he had bet during and after November 1973, particularly when he had testified against Mancini in an extortion case heard before Hon. Robert C. Zampano, approximately seven months before defendant's trial! (Tr. 112, 33a-35a, 53a-54a).

Likewise incredible was Adam's assertions that after each telephone call from either defendant or Alterio,he would immediately contact Agent McNamara and advise him of the contents of the conversation. (55a-58a). Nowhere in Agent McNamara's report of his entire investigation was there any reference to threats of bodily harm to Adam from defendant. (59a-66a) In obvious agreement with defendant's

views towards the quality of Adam's testimony, the court observed:

> "I, too, find it absolutely inconceivable that he told Agent McNamara facts that he related on the stand and Agent McNamara did not record them." (68a-69a)

It is equally clear that the court took a very dim and skeptical view of the probative value of Adam's entire testimony:

> "There is little question in my mind that [Adam's] testimony is honeycombed with inconsistencies, falsehoods and perhaps even admissions of perjury. My own notes are mish-mash of inconsistencies by this witness -- and I do not intend to laundry-list the inconsistencies. I think if anyone reads the record, his head will be spinning after a relatively short trial with the type of witness that was on the stand. I think I make an understatement when I say that almost everything he said on one day he contradicted on the next day, and, in fact, within a ten - or fifteen-minute span he said about ten or fifteen different things...."
>
> I certainly got the feeling that he was extremely careless with his testimony and changed it by the minute....
>
> I think if you closely analyze his testimony there is just serious question in my mind whether conviction should be based upon this type of witness the Government has put on.
>
> (68a, 69a, 70a)

In spite of his strong feelings concerning Adam's testimony, the Court denied defendant's Motion for Judgment of Acquittal. Issues of credibility are jury questions not generally reached on such a motion, "unless testimony is so in conflict or improbable as to be incredible as a matter

of law." United States v. Brooks, 349 F.Supp. 168, (. D.N.Y. 1972). The appellant respectfully submits that Adam's testimony was incredible as a matter of law, and that the Court erred in submitting the case to the jury based on that testimony. No reasonable juror could have found a basis for conviction without reasonable doubt in Adam's testimony. Judge Prettyman formulated the Court's responsibility is such a situation as follows:

> If the evidence is such that reasonable jurymen must necessarily have such a [reasonable] doubt [as to guilt], the judge must require acquittal, because no other result is premissible within the fixed bounds of jury considerations.
>
> Curley v. United States, 160 F.2d 229, 232, cert. den. 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (D.C. Cir. 1947).

However, to compound these evils, there looms the very serious question of Adam's competency to testify when viewed in the light of certain belated revelations by the government on Tuesday, August 20, 1974, being the morning scheduled for closing arguments. Adam's strange demeanor on the stand, his oft-times incoherent testimony and his frequent mysterious episodes of blurred vision (19a, 46a, 61a, 67a) led defense counsel to inquire whether he had taken any pills during the recesses (32a, 40a), which Adam denied, and to further inquire as to his mental condition. Whereupon, Adam responded that he has

no present mental problems and that his mental condition after June 1, 1973 was good. (36a, 52a)

Nothing could have been further from the truth.

On Tuesday, August 20, 1973, the government disclosed that Adam had been taking drugs both prior to his testifying and while he was on the stand. (71a-74a) Furthermore, on direct examination by defendant, Agent McNamara revealed, inter alia; that subsequent to his testimony the previous Thursday he found Adam asleep on a couch in the United States Attorney's office; that Adam did not know who McNamara was although he had sopken with him approximately forty or fifty times; that Adam did not even know where he was and that he "staggered" toward the elevator as if he were intoxicated and that he might have characterized Adam as being in a "stupor"; that Adam admitted to him that he had taken drugs on Thursday, i.e. Cogentin and Trilafon and had taken five tablets of each during the day and while testifying on the stand. (75a-84a)

Thereafter, on direct examination by defendant, Dr. Joseph D'Apice, Adam's psychiatrist,disclosed that Adam had consulted him on July 8, 16; August 6, 9, 16 and August 20, 1974. (85a) Contrary to the repeated denials by Adam, Dr. D'Apice testified, inter alia; that Adam was having mental problems when he came to see him; that Adam had a psychotic depressive reaction; that he had a history of drug use in the past; that he was delusional and heard noises, music and buzzing sounds. (86a)

Furthermore, Adam complained that he was extremely nervous and could not cope and was very concerned about his recent divorce and his business. (87a)

Dr. D'Apice viewed these symptoms as indicating that Adam was suffering from extreme depression and was psychotic at the time. (88a) Poor concentration and poor memory are symptoms of a severe depression. Being psychotic, Adam also was unable to distinguish reality from unreality. (89a) Very often with a psychotic depression of this nature, the person becomes extremely paranoid and feeling that people are out to get him or he is being threatened. (90a, TR, 397) During periods of stress delusions will occur very frequently. (91a)

Dr. D'Apice noted that it was <u>probable</u> that if Adam "--were having these delusions of persecution and so forth, these other paranoid reactions, while under oath, he really could not appreciate the true essence and meanings of his oath." (92a)

Aside from having delusions, Adam was also hallucinating at that time. (Tr. 399, 431) Dr. D'Apice further indicated that such a person definitely loses his concept as to time, dates and places. (Tr. 399, 400)

The mystery as to Adam's chronic thirst, blurry vision and inability to read was likewise cleared up by Dr. D'Apice when he testified that these symptoms would definitely occur

as a result of Adam's use of either Cogentin or Trilafon while testifying (93a) and he had recommended that Adam take only 3 tablets of each per day. (Tr. 408).

It is axiomatic that there must be substantial and competent evidence to support a guilty verdict. See, e.g., Blalack v. U.S., 154 F.2d 591 (6th Cir. 1946); U.S. v. Empire Packing Co., 174 F.2d 16 (7th Cir. 1949). And competency is a matter for the court's determination, not the jury's. Therefore, in ruling upon defendant's motion for judgment of acquittal, the Court had before it the issue of Adam's competency. In light of the astonishing revelations by Agent McNamara and Dr. D'Apice, the motion ought to have been granted, particulary in view of the fact that Adam's own psychiatrist would not certify as to his competency to testify by virtue of his mental disorders. (94a-95a).

Aside from his psychotic condition, Adam's competency was further jeopardized by his drugged condition. The situation is analogous to that of addict-informer and accomplice testimony. Courts have generally held that the testimony of such witnesses may be suspect, and that a trial court must determine whether any particular witness is incompetent because of his use of drugs. See U.S. v. Butler, 481 F.2d. 531 (D.C. Cir. 1973), where the appellate court considered the overall comprehensibility and credibility of the challenged witnesses' testimony, and the existence of extrinsic corraboration which would give "substantial independent assurance of its reliability," at p. 535.

Here, there is no substantial independent assurance of the reliability of Adam's testimony, except for certain portions of the tape recording and Agent McNamara's notes, and both tend to contradict rather than corroborate. Adam himself admitted that he was the only one who could testify to any of the critical conversations. (Tr. 199,200).

To allow the jury to consider such evidence was to invite speculation and conjecture, as the testimony was largely incomprehensible throughout. Evidently, the jury did indeed discount much of what Adams said, as they did acquit on the "May 18" count and fail to reach a verdict on the "May 25" count.

However, the conviction on the conspiracy count, especially, must have been based on Adam's testimony, and possibly much of the same testimony obviously rejected by the jury on at least two of the substantive counts. The inconsistencies and incompetency ran so inexorably throughout all of the evidence that any guilty verdict must necessarily have been founded at least partially on such incompetent evidence.

II. THERE WAS INSUFFICIENT EVIDENCE FROM WHICH THE JURY COULD INFER GUILT BEYOND A REASONABLE DOUBT.

> In ruling on a motion for acquittal for insufficiency of evidence in a criminal trial, the court's inquiry should be whether a reasonable mind of a juror could draw such an inference from evidence so that he might fairly conclude guilt beyond a reasonable doubt.
>
> United States v. Brawer, 482 F.2d 117, (2d. Cir. 1973)

Considering the evidence presented in the most favorable light to the government, there is simply nothing in the record that will support a conviction of either aiding and abetting or conspiring to use extortionate means to collect an extension of credit.

It is not disputed that Adam owed the defendant $10,000. Nor is it disputed that Alterio sought to collect partial payment of that debt and there is sufficient evidence to establish that Alterio threatened Adam. Nothing else is really clear, however. The crucial inquiry is into the relationship between the defendant and Alterio.

The government does not attempt to prove that the defendant himself threatened Adam, but rather seeks to establish some type of secondary liability by virtue of his relationship with Alterio. On the basis of the evidence presented, however, such a relationship could be inferred only through the grossest type of speculation and conjecture, which is clearly not permissible.

Count Six charged that on or about June 1, 1973, the defendant knowingly and wilfully abetted, counseled, commanded, induced, procured and caused Carl Alterio to use extortionate means to collect and attempt to collect an

extension of credit to Harvey Adam, all within the meaning of Sections 891(7) and 894 of Title 18. Section 2 of Title 18 makes an aider and abettor punishable as a principal, "and the proof must encompass the same elements as would be required to convict any other principal." U.S. v. Short, 493 F.2d 1170,1172 (9th Cir. 1974).

The jury could have reasonably found that Alterio used extortionate means to attempt to collect the defendant's debt from Adam. There was no evidence, however, that defendant even approved of such threats, and certainly nothing to support the notion that the defendant was the moving force behind Alterio's actions. The very most that can be inferred is that DiGirolamo knew that Alterio was likely to use violence if authorized to collect the debt. Even if he knew for a fact that Alterio was threatening Adam, the defendant is still not liable as an aider and abettor. It is well-established that knowledge that a crime is being committed is generally not enough to constitute aiding and abetting. See, e.g., U.S. v. Garquilo, 310 F.2d 249,253 (2d. Cir. 1962). Something more must be shown.

The most well-known standard on aiding and abetting is that enunciated by Judge Learned Hand in U.S. v. Peoni, 100 F.2d 401 (2d. Cir. 1938), that it is necessary that the defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." 100 F.2d at 402. See Nye & Nisson v. U.S., 336 U.S. 613,619,69 S. Ct. 766, 93 L. Ed. 919 (1949).

The defendant's relationship with Adam was not consistent with a desire to harm him. The defendant more often seemed plaintive in his demands for payment than he seemed threatening. It is simply not reasonable to infer on these facts that DiGirolamo wanted Alterio to threaten Adam and that that was his intention in sending Alterio to collect the money. The defendant warned Adam on various occasions that he could not control Alterio. (See, e.g. 24a), but never made any statement that would indicate his approval of such methods, let alone solicitation or encouragement.

> When a defendant is charged simply as an aider or abettor, submission to the jury is warranted only if there is enough evidence to show that he knew of such activity of the principal and desired to forward it.
>
> U.S. v. Docherty, 468 F. 2d 989,992 (2d. Cir. 1972)

June 1, 1973, to which Count Six is addressed, was the day on which the conversation between Alterio and Adam was recorded. The jury obviously found the tape recording significant. The closest scrutiny of that conversation, however, will reveal nothing whatsoever that would lead to any conclusion other than that any threats made were not pursuant to authority conferred by the defendant. In fact, Adam says on the tape that DeGirolamo "didn't say he wanted the money," but said it was "out of [his] hands", that he "couldn't do anything." (10a)

Alterio's position is that because Adam owes money to the defendant, Alterio is entitled to $50. It is clear, however, that Alterio is collecting the $50 for himself and not for the

defendant. The following was Judge Zampano's analysis of the transcript of the recorded conversation:

> It was almost as if Adam baited Alterio, who certainly is not very bright at all--he appeared before me for a change of plea--into saying what he did, and turned him right around from a severe beating to an almost handshake, by, as the witness himself said, doubletalking him.
>
> 70a

Certainly the tape is insufficient to sustain an aiding and abetting charge against the defendant for June 1, 1973.

Count Seven charged a conspiracy under Section 894 between Alterio and the defendant. The proof for such a charge is different than that under the "substantive" part of Section 894. Whereas proof of extortion is necessary for a substantive case,

> The essence of the [conspiracy] offense is that the conspirators entered into a scheme or plan to extort and committed an overt act in furtherance of that scheme or plan. See Williamson v. U.S., 207 U.S. 425,447, 28 S. Ct. 163,52 L. Ed. 278 (1908). U.S. v. Rizzo, 373 F. Supp. 204, 206 (S.D.N.Y. 1973). Judgement affirmed 492 F.2d 443.

There is simply no evidence whatsoever here of any such "scheme" or "plan". The only permissible inference is that the defendant permitted Alterio to collect $50 against the debt owed by Adam. It is not illegal to collect a debt, even one that was based on illegal activities.

To make out a case of conspiracy, the jury must infer that DiGirolamo agreed with Alterio that they would try to collect the money from Adam by threatening him. Such an

inference is simply unjustified on the basis of the evidence given. An active member of a conspiracy does not say that the alleged object of the conspiracy is "out of his hands."

Even when viewed most favorably to the government, the evidence is not sufficient to meet the standard for criminal cases in the Second Circuit as enunciated in U.S. v. Taylor:

> "Whether the reasonable mind of a juror could draw such an inference from [the evidence] so that he might fairly conclude guilt beyond a reasonable doubt."
>
> 464 F.2d 240, 244-245 (2d. Cir. 1972)

CONCLUSION

The Defendant-Appellant, for all the reasons stated herein, respectfully requests this Court to reverse his conviction and in the alternative, to reverse his conviction and to remand for a new trial.

Respectfully submitted

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CERTIFICATION

This is to certify that on March 21, 1975 a copy of this brief was mailed first class postage prepaid to the Office of the United States Attorney, 141 Church Street, New Haven, Connecticut and to Paul E. Coffey, Special Assistant U.S. Attorney, 450 Main Street, Hartford,Connecticut.

Charles Hanken